90-123

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LISA REEVES WILSON and RONALD SCOTT WILSON — PETITIONERS

V.

BROOKE DARROW, ETC., ET AL. — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a state's race-based decision to automatically exclude a white couple as prospective adoptive parents of a bi-racial child withstand an Equal Protection challenge (under 42 U.S.C. §1983), where the state offered no evidence of any extraordinary justification or compelling governmental reason for its decision?

PARTIES

All parties to the proceeding in the Court whose judgment is sought to be reviewed are:

Lisa Reeves Wilson and Ronald Scott Wilson, Petitioners

and

Brooke Darrow, Individually and in her official capacity as an employee of the Cabinet for Human Resources; E.A. AUSTIN, Secretary, Cabinet for Human Resources, individually and in his official capacity; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; and D.H., a female infant, Respondents.

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OPINIONS BELOW

The Opinion of the U.S. District Court for the Eastern District at Lexington, on removal from Fayette Circuit Court denying Respondents' motion for summary judgment and remanding to state court, dated October 30, 1987, is unreported. (Appx. 12a-21a).

The Opinion of the Kentucky Court of Appeals with respect to which this Petition seeks review, dated August 25, 1989, is unreported. (Appx. 1a-11a).

JURISDICTION

The Opinion of the Kentucky Court of Appeals with respect to which this Petition seeks review, dated August 25, 1989, is unreported. (Appx. 1a-11a).

The ground on which the jurisdiction of this Court is invoked is that the final judgment, rendered by the highest court in the State of Kentucky in which a decision could be had, is reviewable by this Court by writ of certiorari where any right set forth is specifically claimed under the statutes of the United States.

A final judgment of the Kentucky Court of Appeals is subject to discretionary review by the Kentucky Supreme Court, the Kentucky state court of last resort. Petitioners' timely motion for discretionary review of the Judgment of the Kentucky Court of Appeals was denied on April 18, 1990, by the Kentucky Supreme Court.

Petitioners claim redress for the deprivation of rights under the Equal Protection Clause of the 14th Amendment pursuant to 42 U.S.C. §1983.

The jurisdiction of this Court to review the opinion and judgment of the Kentucky Court of Appeals is invoked pursuant to 28 U.S.C. §1257.

U. S. CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT

Section 1. . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a race discrimination case brought under 42 U.S.C. §1983. Petitioners, Lisa Reeves Wilson (Lisa) and Ronald Scott Wilson (Ron) (collectively, "the Wilsons") are members of the white race. Respondent, D.H., is a female bi-racial child born to a white mother and a black father on July 24, 1984. The remaining Respondents, sometimes collectively "the Cabinet," refused to allow Lisa to adopt D.H. because Lisa is white, D.H. is bi-racial, and Lisa was about to marry Ron, a white man.

From August, 1984 to date, D.H. has been in the legal custody of the Cabinet. Lisa kept D.H. at her home for 4 or 5 days a week, with the knowledge, consent and acquiescence of the Cabinet, and reared her as her own, from mid-August, 1984, until about March of 1986.

In mid-1985, Lisa began her quest to adopt D.H. After contact with D.H.'s social worker and the Cabinet adoption team, Lisa was put in contact with Naomi Murphy of the Cabinet. Mrs. Murphy by letter in October, 1985, informed Lisa that the Cabinet was to have an introductory meeting concerning adoption. On March 3, 10 and 17, 1986, Lisa attended the Cabinet's pre-adoption meetings, as well as special one concerning the adoption of bi-racial children. Lisa's assigned social worker referred Lisa to Respondent, Brooke Darrow ("Darrow") for a decision on the adoption.

At the meeting on April 9, 1986, Darrow acknowledged that she realized that Lisa was attached to D.H., but that factor did not outweigh racial "considerations." Darrow told Lisa that D.H. would not be placed with Lisa for adoption because her home did not possess the requisite racial "qualities."

Darrow told Lisa that the first choice would be to place D.H. with an inter-racial family, the second choice was a black

family, and that *if* the Cabinet considered placing D.H. with a white adoptive family, the Cabinet would look for a mature couple which had been married for a while, had possibly adopted other bi-racial children, lived in an integrated neighborhood and had an integrated lifestyle.

By letter of April 11, 1986, Darrow reiterated in writing what she had told Lisa at their meeting. The racial grounds for Darrow's decision to exclude Lisa from consideration as an adoptive parent of D.H. were precisely outlined. No non-racial reason was given. The Darrow letter is set out in full in the Opinion of the Kentucky Court of Appeals. (Appx. 34a-35a).

Under Cabinet Regulations, Lisa's then unmarried status was no impediment to adoption.[1] However, her approaching marriage to Ron, a white man, was a determining factor in Darrow's decision.

In furtherance of her April 1986 decision, Darrow directed that Lisa have no further contact with D.H. In July, 1986, the Cabinet used its computer to race-match D.H. with prospective adoptive parents willing to adopt a bi-racial child. In December, 1986, the Cabinet placed D.H. with an inter-racial couple who were strangers to D.H.

In early 1987, Wilsons' attorney met with Respondent, E.A. Austin (Austin), Secretary of the Cabinet for Human Resources, and disclosed to him the race-based decision of his subordinates, as set out in the Darrow letter. In the presence

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[1] 905 KAR 1:030. Section and approval of adoptive parents. Section 11. No applicant for adoption and no child suitable for adoptive placement shall be denied approval or placement solely on the basis of age, race, sex, marital status, religion, or national orgin.

of the Wilsons' attorney, Austin telephoned the Cabinet's Commissioner of Social Services, and was told that Darrow's race-based decision was in accord with the Cabinet's transracial adoption policy. Austin related this to the Wilsons' attorney stating, in substance, that the matter would have to be resolved by litigation.

On April 8, 1987, the Wilsons commenced this action in the Fayette Circuit Court under 42 U.S.C. §1983, claiming, inter alia, that Darrow, Austin, and the Cabinet, were persons who, under color of state law, had subjected them to the deprivation of rights, secured under the U.S. Constitution, particularly their right to the Equal Protection of the Laws under the 14th Amendment. They sought monetary and injunctive relief.

The Cabinet removed the action to the U.S. District Court for the Eastern District of Kentucky at Lexington. By Memorandum Opinion and Order of October 30, 1987, U.S. District Judge, Scott Reed, overruled the Cabinet's motion for summary judgment, on grounds that a material factual dispute existed. Judge Reed pointed out that the selection process alleged by the Wilsons, if actually employed by the Cabinet, i.e., automatic exclusion of white persons (and black persons) until all inter-racial couples have been considered and excluded, and then automatic exclusion of all white persons until all black couples had been considered and excluded, was clearly "constitutionally impermissible." (Appx. 18a)

On the other hand, Judge Reed pointed out that the selection process alleged by the Cabinet, i.e., race is considered "as one of several relevant factors in making an adoption placement decision" (Appx. 19a) and that "(a)ll qualifying families...are considered on the basis of the date of approval as adoptive parents in an impartial manner and

without a tiered acceptance approach based on racial classification," (Appx. 19a), if actually employed, was constitutionally permissible. Deferring to state court expertise in domestic matters, Judge Reed sustained the Wilsons' application for abstention, and remanded the case to the Fayette Circuit Court.

After remand, the trial court bifarcated the proceedings. A jury trial was set to determine the sole question of whether the Cabinet had violated the Wilsons' Equal Protection rights by its process for the placement of D.H. Upon a determination that their Equal Protection rights had been violated, the trial court was to thereafter look to "remedy."

The Cabinet's lone defense at the jury trial was that because no home study had been done on Lisa she was not on the approved adoptive list, and it was for that reason that she had been rejected as a prospective adoptive parent of D.H.[2]

Darrow testified, however, that her race-based decision, evidenced by her April 11, 1986 letter, was not made because the Cabinet had done no home study, since she did not then know that Murphy had ordered that no home study be done.

The evidence established that at the time of placement of D.H. with the inter-racial couple the Cabinet's race-matching

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[2] Prior to the Darrow decision, Murphy had made her own race-based decision. Murphy had ordered that no home study be done on Lisa because of Lisa's forthcoming marriage to Ron, a white man. Murphy testified that her decision was in accord with the Cabinet's transracial adoption policy: the "preference is that you place a child with a family of its own race as a first choice." This "reason" was neither mentioned in the Darrow letter nor pled in the Answer. *Post hoc* non-racial reasons to justify race-based decisions were condemned in *Bakke v. Board of Regents*, 438 U.S. 265 (1978), at 320, n.54.

computer showed that state-wide, there were 71 couples willing to adopt a bi-racial child -- forty-three (43) were white, twenty-two (22) were black, and six (6) were inter-racial. In Fayette County, there were 11 couples willing to adopt a bi-racial child -- two (2) were white, six (6) were black, and three (3) were inter-racial.

The couple with whom the Cabinet placed D.H. was 46th (based on approval date) on the state-wide list and 6th (based on approval date) on the Fayette County list. As being the 1st inter-racial couple (based on approval date) on the Fayette County list, that couple was selected.

The Cabinet did not undertake to offer evidence suggesting that a compelling governmental interest was served by its placement of D.H. with the inter-racial couple, strangers to the bi-racial child, to the exclusion of the Wilsons, a white couple known to D.H. almost from birth. The Cabinet offered no evidence, expert or otherwise, as would constitute an extraordinary justification for its race-based decision. The Cabinet's witnesses did nothing but corroborate the fact that the Cabinet's decision was solely race-based.

The author of the Cabinet's transracial adoption policy testified that the Darrow letter was in accord with that policy, that the policy was based on "common sense," that the "world is a white world," and that "society sees a bi-racial child as black." She testified that although she and her husband are white, they were "now a black family" because they had adopted a black child.

Because none of the Cabinet's witnesses purported to establish any compelling governmental interest for the decision to exclude Lisa, and thus Ron, from consideration as adoptive parents of D.H., and because the Cabinet offered no evidence to show any extraordinary justification for its race-

based decision, the Wilsons moved for directed verdict. The motion was overruled.

Over the Wilsons' objection to the refusal of the trial court to define "unlawful discrimination" in the instructions, the jury was permitted to decide if it "believe(d) from the evidence" that the Cabinet had "unlawfully discriminated" against the Wilsons.[3] The jury found for the Cabinet.

Judgment dismissing this action was entered on March 21, 1988. The Wilsons' motion for judgment n.o.v. or, in the alternative, for a new trial was overruled on March 25, 1988.

During the pendency of this action, parental rights of D.H.'s natural parents were terminated. However, by final order entered by the trial court, the Cabinet has been enjoined from taking any further steps leading to the adoption of D.H., pending final outcome of this action.

The judgment of the trial court was affirmed by the Kentucky Court of Appeals. The Wilsons' timely Petition for Rehearing to the Court of Appeals was denied, as was their timely Motion for Discretionary Review by the Kentucky Supreme Court.

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[3] The Court's entire instruction was as follows:

INSTRUCTION NO. 1: No state shall deny to any person within its jurisdiction the equal protection of the laws.

INTERROGATORY NO. 1: Do you belive (sic) from the evidence that the defendant, Brooke Darrow, or other employees of the Cabinet for Human Resources unlawfully discriminated against the plaintiffs because of race when they denied approval or placement of the child sought to be adopted?

Yes _____ No _____

Preservation Of The Federal Question

By their Complaint, the Wilsons alleged that the customs, policies, regulations and decision of the Cabinet to place bi-racial children, including infant D.H. for adoption with bi-racial families or black families rather than white families, including the Wilsons, violated the Wilsons' right to Equal Protection under the 14th Amendment.

The Cabinet's Answer alleged no constitutionally permissible justification for its race-based decision to place D.H. with the inter-racial couple. The Cabinet's Answer alleged merely that its policy on transracial adoption was not discriminatory and that the civil rights claimed by the Wilsons did not exist.

The Wilsons contended on the Cabinet's motion for summary judgment that their automatic exclusion from consideration as potential adoptive parents of D.H. because they are white violated their equal protection rights in that inter-racial and black couples were given preferential consideration on the basis of their race and in effect were the only classification of couples considered for D.H.'s potential adoptive parents.

Immediately prior to the jury trial, the Wilsons moved the Court to direct that the Cabinet introduce no evidence relating to any justification or motive for the Cabinet's decision not to consider the Wilsons as adoptive parents of D.H. other than the race of the Wilsons and the race of D.H. by reason of the Cabinet having failed to plead affirmatively the mixed-motive defense of *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). The Wilsons' motion sought to prevent the Cabinet from introducing any evidence purporting to show that it would have reached the same decision with respect to the Wilsons in

the absence of their race-based decision. The Wilsons' motion was overruled. As it turned out, the Cabinet introduced no evidence of any non-racial reason for its decision.

At the close of all the evidence of the jury trial solely on the question of whether the Cabinet had violated the Wilsons' equal protection rights, the Wilsons moved for directed verdict. For a verbatim recitation of that motion, see Appx. 37a-38a.

The Wilsons tendered instructions to the effect that the Wilsons have the right under the Equal Protection Clause to be considered for adoption of the infant bi-racial child without consideration of their race (white); that Lisa Wilson had the right under the Equal Protection Clause to be considered for the adoption of the infant biracial child without consideration of the fact that Lisa Wilson intended to marry Ron Wilson, a white man; that the Cabinet was not permitted under the Equal Protection Clause to base their decision on whether the Wilsons were to be considered as adoptive parents of the bi-racial child on the racial priorities which preferred other married couples of a different race or racial mixture than that of the Wilsons; that it was a violation of the Wilsons' right under the Equal Protection Clause for the Cabinet to give effect to private racial biases of society when deciding whether the Wilsons were to be considered for adoption of the bi-racial child. The Wilsons' tendered instructions were rejected by the trial court.

The Wilsons strenuously objected to the trial court's instruction which left to the jury the sole question of whether the Cabinet "unlawfully discriminated" against the Wilsons. The trial court refused over the Wilsons' objection to define the words: "unlawfully discriminated." A transcript excerpt

setting out the Wilsons' objections to the Instruction is at Appendix 40a-47a.

The Wilsons' motion for judgment n.o.v. was premised on the absence of any evidence that the Cabinet's race-based decision was in furtherance of any compelling governmental interest, or had any "extraordinary justification" as would overcome its presumptive invalidity under the Equal Protection Clause. Because the evidence showed, without contradiction, that the Wilsons' race was the factor "but for" which the Cabinet would not have acted, and that because such factor is constitutionally unacceptable, the Wilsons argued that they were entitled to a directed verdict and thus judgment n.o.v. Their motion was overruled.

The Wilsons also moved for a new trial on grounds that the instruction allowed the jury to decide (without any definition of the word "unlawfully") whether it believed from the evidence whether the Cabinet had "unlawfully discriminated" against the Wilsons when it denied approval or placement of the child sought to be adopted. Additionally, they sought a new trial on the ground that the verdict was not sustained by sufficient evidence or was contrary to law, relying on the absence of any evidence that the Cabinet had a compelling governmental interest in making its race-based decision when denying the Wilsons approval for placement of the bi-racial child with them for adoption. This motion was overruled. On appeal to the Kentucky Court of Appeals, the Wilsons raised three issues, which are set out verbatim at Appx. 48a.

The Kentucky Court of Appeals decided that despite the fact that the Cabinet "offered no evidence of a 'compelling governmental interest' for its race-based decision, the Wilsons were not entitled to a directed verdict." "That analysis," the

Kentucky Court of Appeals held, "has no application in adoption proceedings." (Appx. 10a).

The Court of Appeals acknowledged that it is well-settled that automatic disqualification of a prospective adoptive parent on racial grounds is unconstitutional. Although twice suggesting that there was evidence at the trial that factors other than race were considered by the Cabinet, the Court of Appeals did not, because it could not, identify any non-racial factor considered by the Cabinet.

The Court of Appeals further held that the jury instruction which left undefined the word "unlawful" including the phrase "unlawfully discriminated" was harmless error[4] in that "the Wilsons had no valid equal protection claim." (Appx. 10a). The Wilsons' objection to the Instruction was that it entrusted a definition of "unlawful discrimination" to the individual notions of untrained laymen: the jury.

The Wilsons' sought discretionary review of the Court of Appeals opinion by the Kentucky Supreme Court. For a verbatim recitation of questions presented to the Kentucky Supreme Court for Discretionary Review, see Appx. 49a-50a.

Discretionary review was denied by the Kentucky Supreme Court on April 18, 1990.

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[4] The Court of Appeals made no mention of settled Kentucky authority, found in *Graves v. Dairyland Insurance Group*, Ky., 538 S.W.2d 42 (1976) that the words "unlawful" and "unlawfully" should never be used in an instruction, and certainly never used without "a careful definition relating it to the factual situation presented by the evidence." *Id.* at 45.

REASONS FOR GRANTING THE WRIT

This Court has never addressed the important question of whether, if at all, state agencies may consider race when making adoption placement decisions, without running afoul of the Equal Protection Clause of the 14th Amendment. The Equal Protection clause protects white persons from governmental race discrimination. *Bakke v. Board of Regents*, 438 U.S. 265 (1978).

With *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court held, in a child custody setting, that the core purpose of the 14th Amendment is to do away with all governmentally imposed discrimination based on race, and that the law may not directly or indirectly give effect to the private racial biases of our society.[5]

This case presents the direct question of whether, in light of the Equal Protection Clause, a state agency may automatically exclude a couple as prospective adoptive parents of a child because that couple's race differs from that of the adoptive child. This case is unhampered by factors normally inherent in a decision of the "best interests of the child."

This Court has made clear that even though a person has no "right" to a valuable governmental benefit, denial of that benefit to a person that infringes constitutionally protected interests is impermissible. See, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Thus, the Wilsons' entitlement to be considered as adoptive parents of D.H. is dependent upon whether the Cabinet violated their Equal Protection Rights by its automatic, race-based selection and rejection process in the placement of D.H.

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[5] The Kentucky Supreme Court followed *Palmore* in *Holt v. Chenault*, Ky., 722 S.W.2d 897 (1987).

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979), at 272, held:

> A racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification. (Citing cases). (Emphasis supplied).

The Cabinet offered no evidence to establish any extraordinary justification for its exclusively raced-based decision. The Cabinet made no attempt to justify its automatic race-based rejection of the Wilsons nor its computerized, automatic race-matching[6] in the placement of D.H. with the inter-racial couple.

The Court in *Drummond v. Fulton County Family and Children's Services*, 563 F.2d 1200 (5th Cir., 1977), *cert. denied*,

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[6] KRS 199.471 provides: "Petitions for adoption of children placed for adoption by the cabinet or a licensed child-placing institution or agency shall not be denied on the basis of the religious, ethnic, racial, or interfaith background of the adoptive applicant, unless contrary to the expressed wishes of the biological parent(s)." Thus, Kentucky's *courts* are prohibited from denying adoption petitions on the basis of the racial background of the adoptive applicant. Under the Cabinet's computerized, race-matching policy, no Kentucky trial court will ever have cause to confront KRS 199.471.

437 U.S. 910 (1978) held, at 1204, that it was bound by the following finding of fact by the trial court:

> [I]t appears to the Court ... that the consideration of race was properly directed to the best interest of the child and was not an automatic-type of thing or of placement, that is, that all blacks go to black families, all whites go to white families, and all mixed children go to black families, which would be prohibited.

To the extent that *Drummond* and *Compos v. McKeithen*, 341 F.Supp. 264 (E.D. La. 1972); *In Re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955); *Spath v. Willis*, 71 App. Div.2d 489, 423 N.Y.S.2d 551 (1980); *State ex rel. Portage County Welfare Dept. v. Summers*, 38 Ohio St.2d 144, 311 N.E.2d 6 (1974); *In Re "E"*, 59 N.J. 36, 279 A.2d 785 (1971) can be cited for the proposition that automatic race-based exclusion of prospective adoptive parents violates the Equal Protection Clause, they conflict with the judgment here.

Justice Stevens, in his dissent in *Wygant v. Jackson Board of Education*, 98 L.Ed.2d 260, 294 (1986) citing only a few of many governmental contexts where the Equal Protection Clause "absolutely prohibits the use of race," included "who may be fit parents," citing *Palmore*, supra. He called use of race in such a situation "utterly irrational." Id. at 294.

A meticulous search of the trial transcript will not disclose whether adoption across racial lines would have been harmful to D.H.

In *Richmond v. Croson, Co.*, 488 U.S. ____, 102 L.Ed.2d 854, 109 S.Ct. ____ (1989), this Court held (in a legislative context) that the absence of evidence by the city which identified discrimination in the city's construction industry amounted to a failure by the city to demonstrate a compelling interest in apportioning public contracting opportunities on

the basis of race, rendering the city's ordinance in that regard violative of the Equal Protection Clause.

Village of Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) at 265-66, rejected the notion that a discriminatory purpose must be the "dominant" or "primary" one for a plaintiff claiming race-based deprivation of rights under the Equal Protection Clause to prevail. If there is proof "that a discriminatory purpose has been a motivating factor in the decision ... judicial deference is no longer justified." *Id.*, at 265-66.

At least one long-term study has been done of families who have adopted children with different racial backgrounds than their own. R. Simon & H. Altstein, *Transracial Adoptees and Their Families: A Study of Identity and Commitment* (1987). The study concludes that the large majority of the families have come through the experience committed to each other and intact. *Id.* at 141. The study notes, however, that the National Association of Black Social Workers is strongly opposed to transracial adoption as a solution to permanent placement for Black children. Simon & Adelstein, at 143.

CONCLUSION

This Petition ought to be granted to decide the important question of whether the Cabinet's automatic race-matching of adoptive parents and adoptive children, including the one involved here, are subject to the same high level of judicial scrutiny as are other governmental race-based decisions when the Equal Protection Clause has been invoked.

WHEREFORE, Petitioners pray that their Petition for Writ of Certiorari to the Kentucky Court of Appeals be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

Respectfully submitted,

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APPENDIX

RENDERED: August 25, 1989; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 88-CA-711-MR

LISA REEVES WILSON and
RONALD SCOTT WILSON — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
V. HONORABLE N. MITCHELL MEADE, JUDGE
ACTION NO. 87-CI-1162

BROOK DARROW, Individually
and in her official capacity
and as employee of the
Cabinet for Human Resources;
E. A. AUSTIN, Secretary,
Cabinet for Human Resources,
individually and in his
official capacity;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN RESOURCES;
d D. H., a female infant — APPELLEES

AND NO. 88-CA-732-MR

CABINET FOR HUMAN RESOURCES — CROSS-APPELLANT

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE N. MITCHELL MEADE, JUDGE
ACTION NO. 87-CI-1162

LISA REEVES WILSON,
RONALD SCOTT WILSON
and THOMAS L. CLARK
(Guardian Ad Litem) — CROSS-APPELLEES

AFFIRMING ON APPEAL /
REVERSING ON CROSS-APPEAL

* * *

BEFORE: HOWERTON, Chief Judge, HAYES and REYNOLDS, Judges.

HAYES, JUDGE: Lisa Reeves Wilson and Ronald Scott Wilson appeal from judgments entered in Fayette Circuit Court, after a jury trial, dismissing their action brought under 42 U.S.C. § 1983 against the Cabinet for Human Resources and two of its employees. (Appellees will hereinafter be referred to as CHR).

In August, 1984, CHR took legal custody of a month-old child, Maria, born to a white woman and a black man, and placed her with a foster parent, Helen Kidd. Lisa Wilson, then 24 years-old and single, knew Helen Kidd personally and so first had contact with Maria[1] that same month. Lisa then started taking Maria home with her every weekend, and it expanded to four or five days per week. This arrangement continued, according to Lisa, with the knowledge of CHR. In August, 1985, a CHR social worker, Edie Dye, arrived at Lisa's home to pick-up Maria for her weekly visit with her biological mother. When Lisa inquired about a possible adoption of Maria, Dye told her to get on the adoption list. Lisa contacted the adoption team and was referred to Naomi Murphy, who placed her on the list and arranged an introductory meeting. In March, 1986, Lisa attended four pre-adoption meetings, including one designed specifically for biracial children. The social worker then assigned to Lisa was Charla Lampson, who referred her to Brooke Darrow a CHR supervisor. In April, 1986, Lisa and Darrow met, and Darrow informed her that the first choice for adoption would be a biracial couple, the second choice would be a black

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[1] Also referred to as Dorothy or D. H.

couple, and the third choice would be a white couple who had been married for a while, who possibly had adopted other biracial children, had an integrated lifestyle, and lived in an integrated neighborhood. On April 11, 1986, Darrow sent Lisa a letter, giving her reasons for rejecting her for Maria's adoption.

> Dear Lisa,
>
> I appreciate the fact that you and your mother came into my office on April 9 to share your interest in Dorothy aka "Marie". I wanted to reiterate in writing what we discussed.
>
> Parental rights on Dorothy's mother have not been terminated. She is not free for adoption. If parental rights are terminated we will be requesting an interracial adoptive family since Dorothy is biracial. We will also look at black families. If we consider placing her with a white adoptive family, we will be looking for a mature couple who have been married for a while, live in an integrated neighborhood, possible [sic] have adopted other biracial children, and live an integrated lifestyle.
>
> I can not foresee us selecting your home over other adoptive families who possess the qualities that I outlined above. I realize that you have become attached to Dorothy through baby-sitting, but this factor will not out weigh the other considerations.
>
> I have discussed the availability of interracial and black adoptive families with our adoption specialist. Based on the number of families

waiting we would not consider your home for Dorothy.

I feel that you need to accept the realization that Dorothy will not be placed with you. I know from our meeting that this is difficult for you and your mother to accept.

I appreciate your interest and concern for Dorothy. I would be glad to talk with you to help you accept our decision.

Sincerely,

Brooke Darrow
Family Services Office
Supervisor

After receiving this letter, Lisa requested that CHR reconsider her as an adoptive parent and conduct a home study evaluation. Her request was denied, based on the fact that Lisa would not be married until February, 1987. After their marriage, Lisa and Ron moved into a house and she again requested a home study, and was turned down. Prior to the marriage Lisa had lived with her parents. In December, 1986, two months prior to Lisa's marriage, CHR had already placed Maria in the home of an interracial couple, John and Trudy Cavins, for the purpose of adoption. They had been on the adoption list for one year.

In April, 1987, Ron and Lisa filed this action in Fayette Circuit Court, charging a violation of the equal protection clause, because of the racial considerations used by CHR. They demanded injunctive relief, and punitive and compensatory damages. CHR then removed the case to the district court for the Eastern District of Kentucky on grounds of federal question jurisdiction, and CHR moved for summary judgment. In October 1987, this motion was denied, with the Court finding that a material factual dispute existed concerning the actual

cabinet policy employed. The Court found that the written policy of the cabinet, in using race as only one of many factors in the selection process, was constitutionally permissible. However, the selection process alleged by Lisa and Ron Wilson, in automatically excluding them on racial grounds, was clearly prohibited by the Constitution and case law. The Court found support in the record for the existence of each of these processes. Because the Court reasoned that the type of domestic matter is best suited for resolution in state forums, the case was remanded back to the Fayette Circuit Court for trial on the equal protection issue.

In February, 1988, a jury trial was held, and the following instruction was given to a seven-member jury over both parties' objection.

INSTRUCTION NO. 1

No state shall deny to any person within its jurisdiction the equal protection of the laws.

INTERROGATORY NO. 1

Do you belive (sic) from the evidence that the defendant, Brooke Darrow, or other employees of the Cabinet for Human Resources unlawfully discriminated against the plaintiffs because of race when they denied approval or placement of the child support (sic) sought to be adopted?

The verdict was unanimous against the appellants. Their motion for a judgment n.o.v. or for a new trial was overruled and this appeal followed.

The appellants initially contend that because the cabinet offered no evidence to overcome its presumptively invalid decision, they were entitled to a directed verdict or a judgment n.o.v.

It is well settled that automatic disqualification of a prospective adoptive parent on racial grounds is unconstitutional. Drummond v. Fulton City (sic) Depart. of Family & Children's Services, 563 F.2d 1200 (5th Cir. 1977). Annotation, Race as a Factor in Adoption Proceedings, 34 A.L.R.4th 167 (1984). Race may, however, be considered as one of many factors in placing a child in a suitable home. Drummond, supra. Re: Adoption of Baker, 117 Ohio App.. 26, 185 N.E.2d 51 (1962). Crakow v. Department of Public Welfare, 362 Mass. 452, 95 N.E.2d 184 (1950). "There may be reasons why a difference in race or religion, may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare." In Re Adoption of A Minor, 228 F.2d 446, 447 (D.C. App. 1955). In these cases, the best interest of the child is the ultimate goal. 2 Am. Jur. 2d Adoption § 61 (1962). 905 KAR 1:030(1).

Any statutes or policies prohibiting interracial adoptions have been held unconstitutional. Re Gomez, 424 S.W.2d 656 (Tex. App. 1967). Moreover, although adoption agencies have traditionally sought to implement policies of racial matching, in recent years societal changes have caused a movement to reorient agencies to reject that approach and encourage interracial placements. Racial Matching and the Adoption Dilemna (sic): Alternative for the Hard to Place, 17 J. Family Law 333 (No. 2, 1978-1979).

Kentucky Revised Statute 199.472 requires that CHR establish criteria to be followed for the adoption of children and promulgate this criteria by administrative regulations. KRS 199.471 prohibits petitions for adoption from being denied on racial grounds.

Under Kentucky Administrative Regulations, "[n]o applicant for adoption and no child suitable for adoptive placement shall

be denied approval or placement solely on the basis of age, race, sex, martial status, religion, or national origin." 905 KAR 1:030(11). Other relevant parts of this regulation include:

> Section 2. The approval of applicants for adoption shall not guarantee the placement of any child with them.
>
> Section 3. In order to be approved, applicants shall make themselves available to representatives of the Cabinet for Human Resources for the purpose of evaluating their abilities to meet the needs of children available for adoption.
>
> Section 4. Applicants shall be subject to departmental visitation, supervision, and evaluation of the child in the applicant's home after the child has been placed.
>
> Section 5. Placement of a particular child with an applicant shall require prior approval by the Cabinet for Human Resources.
>
> Section 6. The Cabinet for Human Resources shall consider placement of a child with an adoptive applicant of appropriate and responsible age, sufficient physical and mental health, adequate financial resources and housing facilities to provide a stable environment that meets the child's needs. The home shall provide an environment that is conducive to the child's well-being.

The Cabinet further has adopted the Department for Social Services Manual for implementing and enforcing the adoption

regulations:

> All things being equal it is preferable to place a child in a family of his own racial background. However, no child available for adoption should be deprived of the opportunity to have a permanent family of his own because of his age, religion, race, nationality, residence, or handicaps that do not preclude his living in a family or community. Because of this, racial background in itself should not determine the selection of a family for a child. Transracial adoption is a valid method of providing a child with a home and family that will meet his needs.

In this case the United States District Court for the Eastern District of Kentucky found that the written policy of the Cabinet was valid, so the question becomes whether that policy was actually implemented, or whether race was the sole criteria used.

There was evidence at trial of both selection methods. Lisa testified that Ms. Darrow informed her during their meeting in April, 1986 that the parental rights of Maria's parents had not yet been terminated, and even if they were, the first choice would be a biracial family, then a black family, and third, a white family with other biracial children and who had been married awhile. The letter from Darrow confirms this policy, specifically, where it is stated that "[i]f parental rights are terminated, we will be requesting an interracial, adoptive family since Dorothy is biracial." After that, her repeated efforts for a home study were rejected. Although she and Ron had purchased a home, and it was furnished, they had not moved in because they were not yet married. The child was then placed for adoption to one of CHR's own white employees, who was married to a black man.

Lisa further testified that instead of placing the child by utilizing CHR's computer matching system, the child was referred directly to CHR's employee through Darrow and Virginia Sturgill, a family services program specialist with CHR. Sturgill admitted in her deposition that she referred the employee's name to Darrow. The last time that Lisa saw Maria was December 28, 1986, when she dropped off a Christmas present for her. Maria kept calling her "Mommy" and immediately went to get her shoes and socks. As a result, Lisa had to sneak out.

Gwen Winters, employed with CHR as an administrative specialist senior, testified that in April, 1986, when Darrow and Lisa met and Lisa requested adoption, there were 72 families in Kentucky awaiting a biracial child. Forty-five were white, 22 were black and 5 were interracial. In July, 1986, there were 71 families. Eleven of those were on the Fayette County approved adoption list, which is a prerequisite to doing a home study. Three of those were interracial, two were white, and six were black. The Cavins were sixth on the Fayette County list, and first out of the three interracial couples. These couples had approval dates ranging from 1982 to 1986. The Cavins had been approved in July, 1985, one month prior to Lisa's initial requests.

Patricia Mertens, the Wilson's (sic) former attorney, testified that he (sic) met with E. A. Austin, Secretary for CHR, and asked him about the policy as written in Darrow's letter. Austin, in Merton's (sic) presence, phoned Anna G. Day, Commissioner of Social Services, and verified through her that the policy of CHR was correctly set out in Darrow's letter.

Naomi Murphy, supervisor of one of CHR's adoption units, testified concerning the adoption process itself. She stated that the first step would be an informational session. Next would be several preparation group sessions. Next would be the home

study evaluation, medical reports, autobiographies, interviews, and then the home study would be written up. The district manager does the approval and it then goes to Frankfort, where the couple is placed on an adoption list. Although single people may adopt, Murphy did not order a home study because another home study would have had to have been conducted after the marriage. Although Kentucky Administrative Regulations bar discriminating on basis of marital status, Murphy's own policy was that a couple should be "married awhile" before one would be ordered. The summaries prepared by Murphy, concerning various sessions with Lisa, had not been transmitted to Darrow at the time Darrow wrote the April, 1986 letter. She had no input into Darrow's decision.

Based on the foregoing, the trial court did not err in failing to direct a verdict for the Wilsons. Their case was tried solely on equal protection grounds, arguing that CHR offered no evidence of a "compelling governmental interest" for its race-based decision. That analysis, however, has no application in adoption proceedings. As stated earlier, race may be considered as one of many factors in placing a child for adoption.

The Wilsons also maintain that the jury instructions were erroneous because they used the word "unlawful" without attempting to define the term in relation to the facts as presented. We find that the first instruction, when combined with the second instruction, was adequate. Even if it was error, it was harmless, as the Wilsons had no valid equal protection claim.

On its cross-appeal, CHR argues that the court erred in ordering it to pay the attorney's fee of the court-appointed guardian ad litem, and in failing to award CHR costs. We agree. KRS 453.060(2) provides that a guardian ad litem shall be allowed a reasonable fee for his services "to be paid by the

plaintiff and taxed as costs." See also CR 17.03. In addition, CR 54.04 provides that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law."

Accordingly, this case is affirmed on appeal and reversed and remanded on cross-appeal for proceedings consistent with this opinion.

ALL CONCUR.

ATTORNEY FOR APPELLANTS/CROSS-APPELLEES:
William C. Jacobs
Lexington, KY

ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS:
Ryan Halloran
General Counsel

Trisha Zeller James
Cabinet for Human Resources
Frankfort, KY

ATTORNEY FOR CROSS-APPELLEE:
Thomas L. Clark
Amos & Clark
Lexington, KY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-136

LISA REEVES WILSON
RONALD SCOTT WILSON PLAINTIFFS

VS. MEMORANDUM OPINION

BROOKE DARROW, ETC., ET AL. DEFENDANTS

* * * * * * * * * * *

This matter is before the court on plaintiffs' motion for abstention and remand, defendants' motion for summary judgment, and defendants' motion to seal court records.

FACTS

D.H. (also referred to as Maria) is an interracial female child, born July 24, 1984. Her natural mother is white and her natural father is black. The Kentucky Cabinet for Human Resources took D.H. from the custody of her natural mother on August 1, 1984, and placed the child with foster parents, Hughie and Helen Kidd. The Kidds are white. While D.H. stayed with the Kidds, Lisa Reeves Wilson (then Lisa Reeves and a plaintiff in

this action) voluntarily baby-sat for the child, which included keeping the child overnight at the home of her parents where she resided up to the date of her marriage to Ronnie Wilson (also a plaintiff in this action) in February 1987.

In August of 1985, Mrs. Wilson expressed an interest in adopting D.H. by contacting Edie Dye, the foster care social worker on the case. Ms. Dye informed Mrs. Wilson that she needed to contact the adoption team and get on the adoption list. Mrs. Wilson then contacted Ms. Naomi Murphy of the adoption team, who told her that the first step in the adoption process was to attend preparational classes.

Mrs. Wilson attended a number of such adoption classes, including a class concerning the adoption of bi-racial children. During the course of these meetings, the cabinet informed Mrs. Wilson that in order to become an approved adoptive parent and get on the waiting list a home study had to be completed. On April 9, 1986, Mrs. Wilson and her mother met with Brooke Darrow, a family services office supervisor. Ms. Darrow informed them that Mrs. Wilson would not be considered as a potential adoptive parent for D.H. because she was white. In explaining this decision, Ms. Darrow referred to the cabinet's policy, all things being equal, of placing a child in a family of his own racial background. Because D.H. was bi-racial, Ms. Darrow stated that the cabinet would first try to place D.H. with an interracial couple. If a satisfactory interracial couple could not be found on the adoptive list, the cabinet would place D.H. with a black family. If no satisfactory black adoptive parents are available, the cabinet might then consider white adoptive parents if they possessed such characteristics as a long stable marriage, residency in an intergrated (sic) neighborhood, other adopted bi-racial children, and a generally integrated lifestyle. On April 11, 1986, Ms. Darrow sent a letter to Mrs. (sic) Reeves for the

purpose of summarizing their discussions during their April 9, 1986 meeting. In her letter Ms. Darrow reiterated the cabinet's order of racial preferences for potential adoptive parents of bi-racial children. She concluded her letter by emphasizing that Mrs. Wilson would not be considered as a potential adoptive parent because of a sufficient availability of interracial and black adoptive families.

After receiving this letter, Mrs. Wilson requested that the cabinet reconsider her as a potential adoptive parent of D.H. and conduct a home study evaluation for such purposes. The cabinet refused to conduct a home study. Mrs. Wilson was married in February of 1987. After her marriage, she and her husband again requested that the cabinet conduct a home study for the purposes of considering them as potential adoptive parents of D.H. Again, the cabinet refused to conduct a home study. In December of 1986, the cabinet placed D.H. at legal risk in the home of an interracial couple, John and Trudy Cavins, for the purpose of adoption. The Cavins had been on the adoptive parent waiting list for over one year.

In April of 1987, the Wilsons filed this action in Fayette County Circuit Court, charging the cabinet with violating their constitutionally secured equal protection rights by refusing to consider them as potential adoptive parents of D.H. solely on the basis of their race. The defendants removed the case to this court on the ground of federal question jurisdiction. In June of 1987, the plaintiffs gave notice of intent to take the depositions of the Cavins. The cabinet moved this court to quash the Cavins' subpoenas and for a protective order. By order of July 20, 1987, this court suspended all discovery pending resolution by the court of the issue whether it possesses subject matter jurisdiction of this action. The plaintiffs have since briefed the

jurisdiction issue in their motion for abstention and remand as have the defendants in their motion for summary judgment.

DECISION

I. Motion for Summary Judgment

It cannot be disputed that the automatic denial of adoption on the basis of race is constitutionally impermissible. Drummond v. Fulton City (sic) Dept. of Family, Etc., 563 F.2d 1200, 1205 (5th Cir.), cert. denied 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1977); In Re Adoption of a Minor, 228 F.2d 446, 448 (D.C.App. 1955); Compos v. McKeithen, 341 F.Supp. 264, 266 (E.D. La. 1972); see generally, Annotation, Race as a Factor in Adoption Proceedings, 34 A.L.R.4th 167 (1984); Note, "Constitutional Law: Race as a Factor in Interracial Adoptions," 32 Catholic U.L.Rev. 1022 (1983); Note, "Race as a Consideration in Adoption and Custody Proceedings," U.Ill.L.F. 256 (1969). By the same token, however, consideration of race as one of several factors in the child placement process is permissible. Id.; see also generally Annotation, Religion as a Factor in Adoption, 48 A.L.R.3rd 383 (1973) (discussing the analogous inquiry over the permissibility of considering the religion of would-be adoptive parents).

Traditionally, adoption agencies have employed a policy of ethnic and racial matching between the child and the prospective adoptive parents. In support of this view, the agencies reasoned that the best interests of the child were served by seeking to match the physical appearance of the chid to that of the parents in order to create an integral family unit. They further reasoned that such a view mirrored societal mores concerning race relations.

As the racial attitudes of the American society have begun to change, and the effects of the legalization of abortion have reduced the number of the available children for adoption, a

trend has emerged to accept and to even encourage interracial adoption placements. Supporters of this trend contend that the community of the adoptive family is much more likely now to accept interracial families with few or no racial stigmas than before, that interracial families promote greater understanding and acceptance among the different races of people, and that interracial adoption allows greater opportunities for placement of the child in the most supportive and caring atmosphere that can be secured. See generally, Note, "Racial Matching and the Adoption Dilemna (sic): Alternatives for the Hard to Place," 17 J.Family Law 333 (1978-79). This trend has not been met with complete acceptance by professionals in the field of sociology. Critics of interracial adoption have argued that such placement will preclude the development of the child's ethnic identification. Id. It is agreed, however, among supporters and critics of interracial adoption that interracial placement in a caring family is preferred over institutional placement for the child.

In the instant case, Mr. and Mrs. Wilson claim that they were automatically excluded from consideration as potential adoptive parents of D.H. because they are white. They contend that the cabinet's refusal to consider them as potential adoptive parents violates their equal protection rights under the United States Constitution in that interracial and black couples were given preferential consideration of the basis of their race and, in effect, were the only classification of couples considered for D.H.'s potential adoptive parents.

The cabinet contends that their placement policies are not constitutionally impermissible and that this court should dismiss this matter on the merits because the plaintiffs have shown no constitutionally protected interest in the adoption process of D.H. In support of their contentions, the cabinet cites the

written policy of the Department of Social Services on interracial adoption which reads as follows:

TRANSRACIAL ADOPTION

> All things being equal it is preferable to place a child in a family of his own racial background. However, no child available for adoption should be deprived of the opportunity to have a permanent family of his own because of his age, religion, race, nationality, residence, or handicaps that do not preclude his living in a family or community. Because of this, racial background in itself should not determine the selection of a family for a child. Transracial adoption is a valid method of providing a child with a home and family that will meet his needs.

The cabinet has also filed an affidavit of Ms. Gwen Winters, an administrative specialist senior with the Department for Social Services, in which she reports that the cabinet has placed sixty-four bi-racial children over a period of the past four years and that these children were placed in thirty-one white homes, twenty-one black homes and twelve bi-racial homes.

Ms. Winters also provides information on the selection process employed by the cabinet in the placement of children with adoptive homes. Her affidavit reveals that after the cabinet conducts a home study of the adoptive home, the date of the approval and all of the family's acceptable characteristics are entered into a computerized system. This information is cross-referenced by the computer with the characteristics of children which are entered into the computer as they become available for adoption. Thus, the computer generates matches between children with certain characteristics and adoptive parents who are accepting of such characteristics. Adoptive parents who conform with the match are considered in approval-date order,

with those having waited the longest being given first consideration. The cabinet does maintain separate lists of approved adoptive parents in which such parents are classified according to race and approval date. Ms. Winters does not make clear how these separate racial lists are employed in the child placement process. Finally, the cabinet cites several cases which it contends sanction the action taken by the cabinet with regard to the Wilsons.

As a preliminary matter, the court notes that the cabinet has incorrectly characterized the Wilsons' complaint as an action for deprivation of a property or liberty interest without due process. The sole constitutional issue involved with the pending action concerns an allegation of a violation of the equal protection clause of the fourteenth amendment. Accordingly, the court will disregard that argument of the cabinet which deals with due process issues and those cases cited in support thereof.

Two methods for selection of potential adoptive parents have been alleged by the parties. Plaintiffs allege a selection process that automatically excludes white persons and black persons as potential adoptive parents of a bi-racial child until all interracial couples have been considered and excluded as potential adoptive parents. Similarly, once all interracial couples are excluded, plaintiffs allege that the cabinet refuses to consider placing a bi-racial child with a white adoptive home until all black adoptive homes have been considered and excluded as potential adoptive parents. Defendants allege that all approved adoptive families possessing matching accepting characteristics are considered for every matching child and that race is only considered as one of many pertinent factors.

It is clear from the case law that the selection process alleged by the Wilsons, if actually employed by the cabinet, is constitutionally impermissible. Drummond v. Fulton Co. Dept.

of Family, Etc., 563 F.2d 1200 (5th Cir.), cert. denied, 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1977); Compos v. McKeithen, 341 F.Supp. 264 (E.D. La. 1972); In Re Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955); Spath v. Willis, 71 App. Div.2d 489, 423 N.Y.S.2d 551 (1980); State ex rel. Portage County Welfare Dept. v. Summers, 38 Ohio St.2d 144, 311 N.E. 2d 6 (1974); In Re "E," 59 N.J. 36, 279 A.2d 785 (1971). Such a selection process does automatically exclude a potential adoptive parent on the basis of race. Although in theory adoptive parents of all races could conceivably be considered under this tiered approach, the implementation of this process effectively bars adoptive parents of some races from equal access to consideration with adoptive parents of other races. By the same token, it is clear from the case law that the selection process alleged by the cabinet is constitutionally permissible. Id. The law has long recognized the appropriateness of considering race as one of several relevant factors in making an adoption placement decision. The selection process alleged by the cabinet allows race to be considered, but prevents it from barring the consideration of an adoptive home on the basis of race. All qualifying families, the cabinet alleges, are considered on the basis of the date of approval as adoptive parents in an impartial manner and without a tiered acceptance approach based on racial classification as alleged by the Wilsons.

Each alleged selection process has support for its existence in the record. Ms. Darrow's April 11, 1986 letter to Mrs. Reeves Wilson and the cabinet's refusal to conduct home studies for the plaintiffs support the plaintiffs' contention that they were automatically excluded from consideration because of their race. The cabinet's written policy regarding transracial adoption, Ms. Winter's affidavit describing the selection process, and the fact that the Wilsons were not yet on the approved adoptive list indicate that the cabinet did not automatically exclude the

Wilsons from consideration as potential adoptive parents of D.H. simply because they are white. Accordingly, it is clear that a material factual dispute exists concerning the actual cabinet policy employed. Summary judgment, therefore, is not appropriate at this time, and the defendants' motion for summary judgment will be denied.

II. Motion for Abstention and Remand

The plaintiffs contend that this court has jurisdiction over this action but should abstain from deciding this matter and remand the case back to state court. In support of this contention, the plaintiffs note the traditional rule that issues of domestic import are matters better suited to state court disposition. Firestone v. Cleveland Trust Company, 654 F.2d 1212 (6th Cir. 1981); Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974).

Having spent many years on both federal and state judiciary benches, this court is very cognizant that domestic matters are best resolved in the state judicial system. Because of the very local nature of domestic matters and the strong interests that states have in resolving such issues, as well as the developed expertise of local agencies and courts, state judicial systems possess a marked advantage over federal courts in the resolution of domestic matters.

It is true that this case cannot be resolved without first addressing the plaintiffs' equal protection claims and these constitutional claims are properly subject to resolution by this court. The existence of federal-question jurisdiction, however, should not prevent this court from remanding this action to a forum more suited to dealing with the inherent domestic issues present. See Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 563 (7th Cir. 1986); Kenner v. Morris, 600 F.2d 22,24 (6th Cir. 1979); Williams v. Williams, 532 F.2d 120, 122 (8th Cir. 1976); Gras v. Stevens, 415 F.Supp. 1148, 1154 (S.D. N.Y. 1976).

The state court system is not precluded from providing a complete disposition of this action in that it may address the constitutional issues raised as well as provide whatever relief may be determined to be appropriate.

Because this matter is particularly suited for disposition by the state judicial system, this court feels that the plaintiffs' motion for abstention and remand should be granted.

A separate order in accordance with this memorandum will be entered on the same date herewith.

This 30th day of October 1987.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-136

LISA REEVES WILSON
RONALD SCOTT WILSON PLAINTIFFS

VS. ORDER

BROOKE DARROW, ETC., ET AL. DEFENDANTS

• • • • • • • •

In accordance with the Mermorandum(sic) Opinion entered on the same date herewith, IT IS NOW ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendants' motion for summary judgment is hereby DENIED.

2. Plaintiffs' motion for abstention and remand is hereby GRANTED.

3. This action is hereby REMANDED to the civil branch of the Fayette Circuit Court of the Commonwealth of Kentucky.

4. This action is hereby DISMISSED and STRICKEN from the docket of this court.

This 30th day of October 1987.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 10-30-87
LESLIE G. WHITMER, CLERK

BY: Mary B. Finocchiaro D.C.

FAYETTE CIRCUIT COURT
SECOND DIVISION
CIVIL BRANCH

LISA REEVES WILSON and RONALD SCOTT WILSON — PLAINTIFFS

MAR 17 1988

VS. TRIAL, VERDICT AND JUDGMENT — NO. 87CI-1162

BROOKE DARROW, ET AL. — DEFENDANTS

• • • •

The above captioned action having come on for trial by jury on February 24, 1988 and the Plaintiffs and Defendants having announced ready for trial, the trial began with the selection of the following jury which was sworn to try the case:

511 Sonja Mather
513 Ada Martin
516 Joseph Bancroft
533 Joeann Hancock
543 Charles Hagen
545 Candice Zaluski
551 Doris Miller

By agreement of all parties and the Court being advised, this trial was conducted before a six person jury.

Upon the aforesaid jury having been empanelled and counsel for the parties having presented proof, the jury was instructed on the law of the case, and closing arguments were presented by counsel for the Plaintiffs and Defendants.

The clerk drew the name of Joeann Hancock, #533, as alternate juror and said Joeann Hancock was discharged by the Court. The jury then retired and after due diliberation (sic) returned the following verdict, viz:

INSTRUCTION NO. 1

No state shall deny to any person within its jurisdiction the equal protection of the laws.

INTERROGATORY NO. 1

Do you believe from the evidence that the defendant, Brooke Darrow, or other employees of the Cabinet for Human Resources unlawfully discriminated against the plaintiffs because of race when they denied approval or placement of the child sought to be adopted?

ANSWER

NO

The verdict was unanimous and signed by the foreman, Candice Zaluski, #545.

WHEREFORE IT IS ADJUDGED that the Defendant did not discriminate against the Plaintiffs.

/s/ N. Mitchell Meade
JUDGE, FAYETTE CIRCUIT COURT

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
BY: /S/ DEPUTY

True copies attest this 3-17-88
and forwarded to Hon. William Jacobs,
173 North Lime, Lexington, Ky. 40507,
as Atty. of Record for the Plaintiffs,
and to Hon. Trisha James, Cabinet for
Human Resources, 275 E. Main St., 4-West,
Frankfort, Ky. 40621, as Atty. of Record
for the Defendants.
Robert M. True, Clerk FCC
/s/
Deputy

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION
MARCH 21 1988

LISA REEVES WILSON, et al.		PLAINTIFFS
V.	FINAL JUDGMENT	NO. 87CI-1162
BROOKE DARROW, et al.		DEFENDANTS

* * * * * * * * * * *

This action having been tried to a jury on the sole question of whether Plaintiffs' Equal Protection rights under the 14th Amendment to the U.S. Constitution had been violated by Defendants, and the jury having rendered its unanimous verdict for Defendants on February 25, 1988, and it appearing that Defendants' thereafter moved the Court for an award of attorney's fees and court costs under 42 U.S.C. §1988, and it further appearing that Hon. Thomas L. Clark, Guardian Ad Litem for the infant Defendant herein, has applied for an award of attorney's fees, and the parties having been heard by counsel on such motion and application, and the Court having found, and does hereby find, that the claims of Plaintiffs' Complaint were not frivolous,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That Plaintiffs' Complaint be, and it hereby is, dismissed, with prejudice;

2. That Defendants' motion for an award of attorney's fees be, and it hereby is, DENIED;

3. That the parties are to bear their own respective costs, except that the Defendant, Cabinet for Human Resources, be, and it hereby is, directed to pay the attorney's fee claimed by Hon. Thomas L. Clark, Guardian Ad Litem for the infant Defendant herein, at the statutory rate of Forty ($40.00) Dollars

per hour, by reason of this Court's finding that it was for the benefit of the Cabinet, as legal custodian of the infant Defendant, that the interests of the infant Defendant be protected.

THIS IS A FINAL JUDGMENT.

/s/ N. Mitchell Meade
N. MITCHELL MEADE, JUDGE

A True Copy
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
By: /s/ Deputy

Attested copies mailed to:
Hon. William C. Jacobs
173 N. Limestone Street
Lexington, KY 40507
Hon. Trisha Z. James
Cabinet for Human Resources
Office of Legal Counsel
275 East Main Street - 4 West
Frankfort, KY 40621
Hon. Thomas L. Clark
Amos & Clark
201 West Vine Street
Lexington, KY 40507

21

MAILED ON MARCH 18, 1988
/s/ Robert M. True by
FAYETTE CIRCUIT COURT CLERK

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION

LISA REEVES WILSON, et al — PLAINTIFFS
VS. — ORDER MAINTAINING STATUS QUO — NO. 87CI-1162
BROOKE DARROW, et al — DEFENDANTS

* * * * * * * * * * * * *

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant, Cabinet for Human Resources be, and it hereby is, directed to withhold its consent to the adoption of the infant Defendant until this action is finally concluded, whether after an appeal or after entry of a final order from which from which (sic) no timely appeal is taken. This is a final and appealable order.

N. MITCHELL MEADE, JUDGE

CC: Hon. William Jacobs
Atty. for Plffs.

Hon. Trisha James
Atty. for Defendant

Robert M. True, Clerk FCC
By: Deborah Meade
Deputy

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
BY: Debbie Meade DEPUTY

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION

LISA REEVES WILSON, et al. PLAINTIFFS

MAR 25 1988

V. ORDER NO. 87CI-1162

BROOKE DARROW, et al. DEFENDANTS

* * * * * * * * * *

Came the Plaintiffs, upon Motion for Judgment Notwithstanding the Verdict, and in the alternative, for a new trial, the Court having considered Plaintiffs' Memorandum, and the parties having been heard by Counsel, and the Court being sufficiently advised

IT IS HEREBY ORDERED AND ADJUDGED

1. That Plaintiffs' Motion for Judgment notwithstanding the Verdict be, and the same hereby is OVERRULED;

2. That Plaintiffs' Motion, in the alternative, for a New Trial be, and the same hereby is OVERRULED.

THIS IS FINAL AND APPEALABLE ORDER.

/s/ N. Mitchell Meade
JUDGE, N. MITCHELL MEADE

TO BE ENTERED:

_____
ATTORNEY FOR PLAINTIFFS

_____
ATTORNEY FOR DEFENDANTS

A True Copy
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
/s/ Susan Griffin Deputy

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 88-CA-711-MR

LISA REEVES WILSON and
RONALD SCOTT WILSON APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
ACTION NO. 87-CI-1162

BROOK DARROW, Individually
and in her official capacity
and as employee of the
Cabinet for Human Resources;
E. A. AUSTIN, Secretary,
Cabinet for Human Resources,
Individually and in his
Official Capacity;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN RESOURCES;
and D. H., A FEMALE INFANT APPELLEES

AND NO. 88-CA-732-MR

CABEINT (sic) FOR HUMAN RESOURCES CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
ACTION NO. 87-CI-1162

LISA REEVES WILSON,
RONALD SCOTT WILSON
and THOMAS L. CLARK
(Guardian Ad Litem) CROSS-APPELLEES

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, Chief Judge, HAYES and REYNOLDS, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: DEC 01 1989 /S/ Charles H. Reynolds
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY
89-SC-953-D
(88-CA-711-MR and 88-CA-732-MR)

LISA REEVES WILSON ET AL. MOVANTS

V. FAYETTE CIRCUIT COURT
87-CI-1162

BROOKE DARROW ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., would grant review.

ENTERED April 18, 1990.

/s/ Robert F. Stephens
Chief Justice

CABINET FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR SOCIAL SERVICES April 11, 1986
710 West High Street
Lexington, KY 40508

Ms. Lisa Reeves
1720 Wyatt Parkway
Lexington, Kentucky 40505

Dear Lisa,

I appreciate the fact that you and your mother came into my office on April 9 to share your interest in Dorothy aka "Marie". I wanted to reiterate in writing what we discussed.

Parental rights on Dorothy's mother have not been terminated. She is not free for adoption. If parental rights are terminated we will be requesting an interracial adoptive family since Dorothy is biracial. We will also look at black adoptive families. If we consider placing her with a white adoptive family, we will be looking for a mature couple who have been married for a while, live in an intergrated(sic) neighborhood, possible(sic) have adopted other biracial children, and live an intergrated(sic) lifestyle.

I cannot foresee us selecting your home over other adoptive families who possess the qualities that I outlined above. I realize that you have become attached to Dorothy through babysitting, but this factor will not out weigh the other considerations.

I have discussed the availability of interacial(sic) and black adoptive families with our adoption specialist. Based on the number of families waiting we would not consider your home for Dorothy.

Lisa Reeves
Page Two
April 11, 1986

I feel that you need to accept the realization that Dorothy will not be placed with you. I know from our meeting that this is difficult for you and your mother to accept.

I appreciate your interest and concern for Dorothy. I would be glad to talk further with you to help you accept our decision.

Sincerely,

/s/ Brooke Darrow
Brooke Darrow
Family Services Office Supervisor

BD:cl

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION

LISA REEVES WILSON and
RONALD SCOTT WILSON PLAINTIFFS

VS. INSTRUCTIONS TO THE JURY NO. 87-1162

BROOKE DARROW, ET AL. DEFENDANTS

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INSTRUCTION NO. 1

No state shall deny to any person within its jurisdiction the equal protection of the laws.

INTERROGATORY NO. 1

Do you belive (sic) from the evidence that the defendant, Brooke Darrow, or other employees of the Cabinet for Human Resources unlawfully discriminated against the plaintiffs because of race when they denied approval or placement of the child sought to be adopted?

Yes _____

No _____

INSTRUCTION NO. 2

Five or more of your number may make a verdict. If your verdict is unanimous, then it need be signed only by the foreman; otherwise, it must be signed by the five or more who agree.

_____
Foreman

_____

_____

_____

_____

_____

Petitioners' Motion for Directed Verdict at the close of all the evidence at the jury trial solely on the question of whether Petitioners' Equal Protection Rights had been violated, February 25, 1988.

(Transcript of Evidence, Vol. II, pp. 92-95):

MR. JACOBS: Plaintiffs move the Court for a directed verdict for the reason that the defendants have pleaded no affirmative defense to the allegations of the complaint relating to the deprivation of equal protection rights by reason of the plaintiffs' being discriminated against because of their race in the defendants' consideration of plaintiffs as possible adoptive parents of the infant biracial child mentioned in the evidence, and the fact that even though the Court allowed them to, over plaintiffs' objection, to try the case without reference to the absence of an affirmative defense in that regard, the defendants still failed to prove any avoidance or defense to the fact, which is clear of record in the evidence, that the race of the plaintiffs, both at the time that Lisa was trying to become the single adoptive parent and because of the letter of Brooke Darrow as it applied to the plaintiff, Ron Wilson, after they become married, that the admitted policy of the Cabinet is that in the placement of biracial children for adoption, the race of the child is preferred. That was testified to by Naomi Murphy. I asked her, "Are you aware of the transracial adoption policy of the Cabinet?" Her answer was, "Yes. That the preference is that you place a child with a family of its own race as a first choice."

We established the allegations of our complaint. There have been no meritorious or any defense to that; therefore, we are entitled to a directed verdict.

In addition, the Supreme Court, in the case of Palmore against (sic) Siboti, 466 U.S. 429 (1984), was looking at the racial implications insofar as it affected custody where the remarriage of a mother to a person of a different race and how that affected custody implications as to where the child should be as between the father and the mother. The Supreme Court said in that case that the core purpose of the Fourteenth Amendment is to do away with all governmentally imposed discrimination based on race. The classifications of persons according to their race is subject to the most exacting scrutiny, and to pass constitutional muster, such classification must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.

We have established that race was considered. The race of the plaintiffs was considered insofar as it related to the adoption of the biracial child. The purported defense of the defendants is we didn't have a home study performed, when the person who decided that no home study was to be done was Naomi Murphy. Knowing the policy, as I said before, that children are placed according to their race by first preference, Brooke Darrow, with her letter, not knowing that Naomi Murphy had made that decision, made an identical decision and laid out for Lisa the impossible problems she had then and Ron would have when they married of adopting the child because of the racial preferences set out in that letter.

The fact that no home study was done is not a defense to the claim of denial of equal protection for the reason that, virtual identical reason, is that was present in the case of Mt. Healthy v. Doyle, a U.S. Supreme Court decision, 429 U.S. 274 (1977). In that case, the analogy that I draw is that the teacher, who was not rehired by the Board of Education, among other things, the Board of Education argued that he had no constitutional rights

because he was an untenured teacher and had not (sic) right to be re-employed, and the Supreme Court specifically held that the teacher did not lose his constitutional rights merely because he was an untenured teacher. He still was entitled to his constitutional protections.

Because no affirmative defense has been pleaded and none has been proven or shown as could overcome the admitted race based discriminatory policy of the Cabinet, the plaintiffs are entitled to a directed verdict on that claim of discrimination and the Court should so order.

THE COURT: Overruled. ...

Petitioners' Objections To The Trial Court's Instruction:

(Transcript of Evidence, Vol. II, pp. 101-112):

MR. JACOBS: Plaintiffs object to the instruction, which will be used in this case for the reason that the jury's instructed to believe whether or not there was unlawful -- what I'm objecting to is "unlawfully discriminated." The reason that I object to using that word is although I think the Cabinet did unlawfully discriminate because the race was the factor that they considered in doing to the plaintiffs what they did, the jury will be left to wonder what unlawfully discriminated means. That will leave me in the position of having to try to argue the law to the jury rather than fact, and I would be pleased to argue law to the jury but I'm not sure I'm allowed to do that. I'm going to have to, I guess, with the word "unlawfully" undefined in this instruction.

I have tendered instructions, which I believe set forth the rights that the plaintiffs had under the equal protection laws (sic), and that is that they had the right to be considered for adoption of the biracial child without consideration of their, that is the plaintiffs', race. They had the right to be considered -- Lisa had the right to be considered to have consideration of the fact that she was about to marry a white man. Both parents have the right to be considered for adoption without consideration by the Cabinet, or whoever made those decisions, that they were a white and married couple.

What I'm very concerned about is that this instruction could very well lead to the jury coming back and saying, "We don't know what unlawful means, so we don't know whether they were discriminated against," and coming back with a no answer.

This is one of the few cases where time was so crucial because of where the child is now placed. I'm concerned about it for that very, very, very major reason.

THE COURT: Of course, it was for that reason I tried to give an early trial date too.

MR. JACOBS: Oh, I understand that. I appreciate that, but what I'm saying is that --

THE COURT: My problem is that if I get in there, I would never get consensus from the parties that what the -- race is a factor, but is it an unlawful factor under the circumstances? You've got to look at the whole spectrum of the thing here, I think, and that's the problem because I could tell 'em in advance what they are to look at. I think you're going to get in trouble or the Court would get in trouble trying to do so.

MR. JACOBS: That's what I think my tendered instructions try to solve. You don't need to give all of those instructions, but the fact is that race cannot be a substantial or motivating factor in the decision of any government. I don't care what the decision is. We're all allowed to be bigoted in private but governments are not allowed to do that, and that's why the case is all clear that government decisions cannot be based on race, and that's why I used the words out of Mt. Healthy "a substantial or motivating factor." I have not said if they considered race, plaintiffs win. I said if it was a substantial or motivating factor. In other words, was that the one that tilted the balance against the plaintiffs?

I think it's important -- I said before I came over here, the Court I'm sure doesn't care, that the case was going to be won or lost on the instructions, and I was very concerned about the word "unlawfully" because that favors the defendants immeasurably.

MRS. JAMES: Your Honor, I would just point out for the record that Mt. Healthy does not involve adoptions, and the controlling law on adoptions is governed by the Drummond case and its progeny, and I would too object at this time, for the record, to any argument of law to the jury.

THE COURT: Well, I think you will be restricted to arguing the facts in this particular case, and I could conceive of that - what was the motivating factor in the Department's decision here?

MRS. JAMES: I understand that.

THE COURT: Was it strictly because of race or were they entitled to consider other matters? That's why I'm limited. I can't go in there and give them a preamble in the beginning and say, "Was consideration of race as the sole factor or the principal motivating factor would be unlawful?" Then ask 'em if, you know, I don't think I can go on ahead and give 'em the rest of 'em. I was in effect arguing the case for you.

MR. JACOBS: Well, I don't see how I can handle the word "unlawfully" in here without talking about what's lawful.

THE COURT: I can recite to them the Fourteenth Amendment.

MRS. JAMES: We have no objection to that.

MR. STRATFORD: No. We think further that the regulation that's contained in the manual, the all thing being equal statement, is a statement of what is lawful. That's Kentucky law and it's based on federal law, so that that's a legitimate -- certainly we can argue this if you're not willing to give us an instruction. That's been put in evidence over and over.

MR. JACOBS: My fear is this instruction is an automatic for the defendants. It's an automatic. I have no shot.

THE COURT: Well, do you want me to recite the Fourteenth Amendment?

MR. JACOBS: No, but what I would ask the Court to do is to set out what the plaintiffs' rights were under the equal protection clause and it's this, that their race could not be considered.

THE COURT: Oh, but I think it can be.

MR. JACOBS: Okay, wait. Then we can say this, that the race of plaintiffs was considered. We know it was considered and that ought to be in the instructions that the race of the plaintiffs was considered.

THE COURT: I can instruct the jury that race should not be the sole motivating factor in its decision with regard to adoption.

MR. JACOBS: That's not the law.

MR. STRATFORD: Yes. I think that we would accept that.

MR. JACOBS: That's not the law.

THE COURT: But we're back to, and I don't think we're ever going to reach a conclusion. I've thought and I've thought and thought how I could handle this and I couldn't fathom any other way of handling it other than the way I've done it here. As I say, I only put "unlawfully" in it at the last minute. That's the last one I did today. Because discrimination in and of itself is not bad, but if it's unlawful, it's the sole motivating factor in the decision. I think it's, in my own, personal opinion, when you've got a biracial child, I think it is important for the child to have the connections with both the black and white parents, and if they think it would be better off in an environment where there is a mixture of the races, I can't fight that honestly.

MR. JACOBS: That's what the Holt case, Holt against Chenault was about, the fact that private racial biases are out there. The Court can't consider those things and no government can consider those things.

THE COURT: Well, I'm saying that in the context of that particular case when you're talking about the custody of a child by natural parents.

MR. JACOBS: In response to that, I would say that the statute relating to the custody of a child, KRS 403.3402 directs the court not to modify a custody decree unless the change of circumstances serve the best interest of the child. Also, it is, in KRS 199.520, and the court is entering a judgment of adoption, the court is supposed to make a finding that the adoption is in the best interests of the child.

The language of the Holt case was what was in the best interests of the child, and the trial court was told by the Kentucky Supreme Court, "You can't consider private biases." Now, if courts can't do it, surely some bureaucrat can't consider private biases in making some decision about somebody that are based on race and private racial biases.

So the instruction should say the Cabinet was not prohibited. I'm asking for less than I want. The Cabinet is not prohibited from considering race in its decision. Do you believe from the evidence that the consideration of race by the defendants was a substantial or motivating factor in their denial of approval and placement of the child sought to be adopted? That is not complicated. It is fair. It's less than I think I'm entitled to, but I'd be willing to take that. I know I can't bargain with you.

This is an automatic for the defendant because the jury can't know what the unlawfully discriminated means. Put in there the one sentence. The defendants were entitled to consider race in their decision for the plaintiff. Do you believe from the

evidence that defendant, Brooke Darrow, or other employees of the Cabinet for Human Resources in -- do you believe from the evidence that the consideration of the race by them was a substantial or motivating factor when they denied approval or placement of the child sought to be adopted? And the word "unlawful," you won't need to use it.

MR. STRATFORD: We think sole factor is the only appropriate thing. It can be a substantial factor.

MR. JACOBS: I say it can't be a factor at all, but I'm trying to get a compromise here between the two. I'm using Supreme Court law that says the purpose of the Fourteenth Amendment is to do away with all governementally imposed discrimination based on race, all of it. All of it.

MR. STRATFORD: We're talking about Supreme Court law and Sixth Circuit law when we say that the rule is all things being equal, race is a legitimate factor to be considered in the placement of any child in the home for the purpose of adoption.

MR. JACOBS: I'll concede that, not that I agree with it, but I'll concede that for purposes of this instruction to have the plaintiffs have a chance in this case. That the defendants are allowed to consider the race, and then ask them do they believe the consideration of race was a substantial or motivating factor.

MR. STRATFORD: I don't think that's conclusive on the issue of whether it was an unlawful discrimination. If they say it was the sole factor, we accept that as being the law. It cannot be the sole factor.

MR. JACOBS: I can't give in on that much. I've already given in. I think it can't be any factor. They're citing a Sixth Circuit case, a federal circuit court case, that other factors were found to be the reason, legitimate ones, not somebody wasn't on a list. That was a fact. The court found the facts in that. It is at least a fair instruction, although I think we can't consider race

at all, to say the defendants are entitled to consider race in making their decision. And then ask them do they believe that consideration of race was a substantial and motivating factor in their decision. It's not complicated. It's easy to follow. I've got Supreme Court law to say it's okay.

THE COURT: I think I would be directing a verdict on your behalf if I gave it as you have pointed out there.

MR. JACOBS: Well, I'm entitled to a directed verdict, but I mean --

MR. STRATFORD: Aren't we all, Bill?

MR. JACOBS: They've been arguing that the only reason was was because they didn't have a home study. They can argue that. I can argue it was race.

THE COURT: I can give 'em a preference and say, in essence, under our constitution, it is unlawful to discriminate against individuals because of their race period, and then give the interrogatory.

MR. JACOBS: I don't prefer that and my objection would be the same as everything else, but at least we have something to talk to the jury about.

MRS. JAMES: I have just a minor problem with that. To give the preference which says it is unlawful to discriminate against anyone on the basis of race and then to say that there are situations where it is lawful, by saying did the Cabinet for Human Resources unlawfully discriminate, I think is giving duplicative signals to the jury. Is discrimination always unlawful or is it unlawful sometimes? It think that they've heard enough of the evidence, that I wish, I might say this, that I felt as confident about this being a slam dunk for the defendants as you do, but that we will go along with that without a preface because, as you say, you've thought about it a long time, and we can't discriminate, but in the area of adoptions, giving

preference to a child's racial heritage is permissible and it's been held so by the courts. And so to say anything more than unlawful is to have the jury's actually acting as judge and deciphering what the law actually is.

MR. JACOBS: Knowing you as I do, the fact that you go along with it is the only reason that I am convinced that you're persuaded that it's a slam dunk because you wouldn't go along with it if you didn't think so.

MRS. JAMES: Well, I just don't want it to slide any further.

MR. JACOBS: It's an automatic for the defendants.

MRS. JAMES: I don't think so, Bill. I wish I felt that way.

THE COURT: I'm going to go ahead with what I've got, and if they come back and ask me, I'm going to tell 'em to use their common sense interpretation of unlawful.

MR. JACOBS: Could you at least put in the preface that it's unlawful under the Fourteenth (sic) protection clause to discriminate against somebody because of their race? Could you at least put that in there?

MR. STRATFORD: To deny equal protection of the laws is what the Fourteenth Amendment says.

MRS. JAMES: Now, we'll go along with that, reading the Fourteenth Amendment, equal protection of the law. But as the Judge has said already in this case, there's a real problem with defining it.

MR. JACOBS: They like your instructions, Judge. They like your instructions, and I don't blame 'em.

MR. STRATFORD: It's not our preference.

END OF CONFERENCE.)

Issues Raised By Petitioners On Appeal To The Kentucky Court Of Appeals:

I. Because the Cabinet offered no evidence to overcome the presumptive invalidity of its decision to exclude the Wilsons, as white persons, from consideration as adoptive parents of the biracial child, as would support an extraordinary justification for that decision, the Wilsons were entitled to a directed verdict, and therefore a judgment n.o.v. on their claim that they were denied the equal protection of the laws.

II. Any evidence which the Cabinet may attempt to construe as supporting the establishment of a compelling governmental interest for its race-based decision ought not operate to defeat the Wilsons' entitlement to a judgment n.o.v. because of the error of the trial court in overruling the Wilsons' motion in limine.

III. Because the trial court's instruction entrusted to the jury the legal issue of whether the Cabinet had "unlawfully discriminated" against them because of race, without a careful definition relating those words to the factual situation presented by the evidence, the Wilsons are entitled to a new trial, with directions to the trial court, as to the appropriate instruction.

Issues Raised By Petitioners On Motion For Disrectionary Review To The Kentucky Supreme Court:

I. Is a decision of the Cabinet for Human Resources to deny approval of an applicant for adoption solely on the basis of race, exempt from the rule of law arising under the Equal Protection Clause, that race-based governmental decisions can be upheld only if the government establishes an extraordinary justification for its race-based decision, and the furtherance of a compelling governmental interest by that decision?

II. Were the Wilson's rights under the Equal Protection Clause violated as a matter of law where the Cabinet, aware that parental bonding had occurred between Lisa and the biracial infant, D.H., placed D.H. for adoption with strangers to the child, solely because the strangers are an interracial couple, and excluded the Wilson's from becoming adoptive parents, solely because the Wilson's are white?

III. Where the Cabinet decided to place D.H., a biracial child, for adoption with an interracial couple, rather than the Wilson's, a white couple, and its decision was made solely on the basis of the race of the principals, and the Cabinet presented no evidence that its race-based decision was in furtherance of any compelling governmental interest, or had any extraordinary justification, were the Wilson's entitled to a directed verdict, and thus, a judgment n.o.v., on the question of whether their rights under the Equal Protection Clause were violated?

IV. Is the question of whether the Cabinet "unlawfully discriminated" against the Wilson's because of their race a question of law for the court?

V. Where the trial court's instruction entrusted to the jury the issue of whether the Cabinet had "unlawfully discriminated" against the Wilson's because of race, without a careful (or any) definition relating the words "unlawfully discriminated" to the factual situation presented by the evidence, are the Wilson's entitled to a new trial, with directions to the trial court, as to the appropriate instruction?